NO. 83-6090

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MICHAEL GENE BERRYHILL,

Petitioner,

v.

ROBERT FRANCIS, WARDEN,
GEORGIA DIAGNOSTIC AND CLASSIFICATION
CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY

BRIEF IN OPPOSITION FOR THE RESPONDENT

SUSAN V. BOLEYN
Counsel of Record for
the Respondent
Assistant Attorney General

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

Please serve:

SUSAN V. BOLEYN
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3397

QUESTIONS PRESENTED

1.

Whether the question of the trial court's denial of Petitioner's motion for a change of venue was decided on nonfederal constitutional grounds and therefore is not properly before this Court, or assuming that the issue is properly raised, whether the Supreme Court of Georgia properly applied federal constitutiona' principles and state law in finding this contention to be without merit?

2.

Whether the state habeas corpus court actually decided the federal question of whether a prospective juror "irrevocably committed to the imposition of the death penalty" must be excused for cause, so as to properly present this question to this Court for its review or whether, assuming this issue to be ripe for adjudication, the Supreme Court of Georgia properly applied this Court's decision in Witherspoon v. Illinois, 391 U.S. 510 (1968), in determining that the failure to excuse said juror was not unconstitutional violation?

3.

Whether under any appropriate standard for reviewing the effectiveness of counsel, and with no necessity of examining cause or prejudice to the Petitioner, Petitioner's counsel at retrial rendered effective assistance?

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
REASONS FOR NOT GRANTING THE WRIT	3
I. THE STATE HABEAS CORPUS COURT DID NOT CONSIDER THE FEDERAL CONSTITUTIONAL CLAIM NOW RAISED CONCERNING THE DENIAL OF PETITIONER'S MOTION FOR CHANGE OF VENUE ON ITS MERITS AND THEREFORE NO FEDERAL CONSTITUTIONAL QUESTION CONCERNING THIS ISSUE IS PROPERLY PRESENTED TO THIS COURT ON THIS PETITION FOR A WRIT OF CERTIORARI.	3
II. THE QUESTION OF THE EXCUSAL FOR CAUSE OF A VENIREPERSON IRREVOCABLY COMMITTED TO THE IMPOSITION OF THE DEATH PENALTY WAS NOT DECIDED ON FEDERAL CONSTITUTIONAL GROUNDS IN THE STATE HABEAS CORPUS COURT'S ORDER WHICH IS THE SUBJECT OF THIS PETITION FOR A WRIT OF CERTIORARI AND THIS GROUND IS NOT PROPERLY BEFORE THE COURT.	6
III. REGARDLESS OF THE APPROPRIATE STANDARD TO BE APPLIED TO CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, THE STATE HABEAS CORPUS COURT CORRECTLY FOUND AS A MATTER OF FACT THAT NO INEFFECTIVE ASSISTANCE OF COUNSEL HAD BEEN DEMONSTRATED.	8
CONCLUSION.	11
CERTIFICATE OF SERVICE.	12

TABLE OF AUTHORITIES

Cases cited:	Page(s)
Berryhill v. Ricketts, 242 Ga. 447, 249 S.E2d 197 (1978), cert. denied, 441 U.S. 967 (1979).	2
Berryhill v. State, 235 Ga. 549, 221 S.E.2d 185 (1975), cert. denied, 429 U.S. 1054 (1977) . .	1
Berryhill v. State, 249 Ga. 442, 291 S.E.2d 685 cert. denied, 103 S.Ct. 317 (1982)	2, 3, 4, 6, 7
Brown v. Ricketts, 233 Ga. 809, 213 ___ S.E. 2d 672 (1975)	3
Elrod v. Ault, 231 Ga. 750, 204 S.E.2d 176 (1974).	3
Hance v. Zant, 696 F.2d 940 (11th Cir. 1983) . . .	7
Herb v. Pitcairn, 324 U.S. 117 (1944).	4, 6
Irvin v. Dowd, 366 U.S. 717 (1961)	4
Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982), cert. granted, 103 U.S. 2451 (1983)	8, 11
Witherspoon v. Illinois, 391 U.S. 510,(1968) . . .	6, 7
Zant v. Berryhill, 640 F.2d 382 (5th Cir. 1981). .	2

NO. 83-6090

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MICHAEL GENE BERRYHILL,

Petitioner,

v.

ROBERT FRANCIS, WARDEN,
GEORGIA DIAGNOSTIC AND CLASSIFICATION
CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Michael Gene Berryhill, a/k/a Michael Gene Stanley, was indicted in the Superior Court of Bartow County, Georgia for the felony murder of George C. Hooks, Jr. and the armed robbery of Mrs. George C. Hooks, Jr. on October 7, 1974. (R. 6). Petitioner was first tried on January 6-10, 1975. Petitioner was convicted of both charges and sentenced to death for the murder and sentenced to life imprisonment for the armed robbery. Petitioner's convictions and sentences were affirmed by the Supreme Court of Georgia on direct appeal. Berryhill v. State, 235 Ga. 549, 221 S.E.2d 185 (1975), cert. denied, 429 U.S. 1054 (1977).

Petitioner's first petition for state habeas corpus relief was denied and on appeal to the Supreme Court of Georgia that court affirmed the felony murder conviction and death sentence, but vacated the armed robbery conviction of the lesser included

offense of the felony murder. Berryhill v. Ricketts, 242 Ga. 447, 249 S.E2d 197 (1978), cert. denied, 441 U.S. 967 (1979). On May 13, 1980, the United States District Court for the Northern District of Georgia granted Petitioner's application for federal habeas corpus relief with reference to both Petitioner's conviction for murder and his death sentence. The verdict was reversed and the sentence vacated due to the district court's finding that a Miranda violation had occurred. The United States Court of Appeals for the Fifth Circuit affirmed the granting of federal habeas corpus relief in Zant v. Berryhill, 640 F.2d 382 (5th Cir. 1981).

Petitioner was retried in June of 1981 in the Superior Court of Bartow County. Petitioner was once again found guilty of the offense of felony murder and received a death sentence. (R. 361). The Supreme Court of Georgia affirmed Petitioner's conviction and sentence in Berryhill v. State, 249 Ga. 442, 291 S.E.2d 685, cert. denied, 103 S.Ct. 317 (1982).

Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia on December 30, 1982. Following an evidentiary hearing, the state habeas corpus court denied Petitioner relief in an order dated August 4, 1983. Petitioner filed an application for a certificate of probable cause to appeal to the Supreme Court of Georgia and this application was denied by that court on September 28, 1983. Petitioner filed a motion for reconsideration of the denial of the application for certificate of probable cause which was denied on October 18, 1983. The filing of a petition for a writ of certiorari to this Court seeking to review the judgment of the state habeas corpus court followed. Further facts will be developed as is necessary for a more thorough review of the issues raised by means of this petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE STATE HABEAS CORPUS COURT DID NOT CONSIDER THE FEDERAL CONSTITUTIONAL CLAIM NOW RAISED CONCERNING THE DENIAL OF PETITIONER'S MOTION FOR A CHANGE OF VENUE ON ITS MERITS AND THEREFORE NO FEDERAL CONSTITUTIONAL QUESTION CONCERNING THIS ISSUE IS PROPERLY PRESENTED TO THIS COURT ON THIS PETITION FOR A WRIT OF CERTIORARI.

Petitioner seeks a writ of certiorari to review the judgment of the state habeas corpus court denying Petitioner habeas corpus relief. The state habeas corpus court reviewed Petitioner's contention that the trial court had abused its discretion in denying the motion for change of venue but found that the previous decision of the Supreme Court of Georgia concerning this issue was binding, the issue having been raised and decided on direct appeal. See Berryhill v. State, 249 Ga. 442 (1982). (Petitioner's Appendix "A" A-10). The court found that under state law as contained in Elrod v. Ault, 231 Ga. 750 (1974), and Brown v. Ricketts, 233 Ga. 809213 S.E.2d 672 (1975), the findings of the Supreme Court of Georgia are binding upon a state habeas corpus court for purposes of review. (Petitioner's Appendix "A" A-10).

The order of the state habeas court concerning which Petitioner seeks review from this Court, did not discuss this claim on its merits, but rather relied on independent state grounds in finding that it was precluded from considering an issue already determined by the Supreme Court of Georgia. Before agreeing to review a state court decision, this Court has required that it be shown that the state court actually decided a federal question and that the decision of the federal

question was necessary to the state court's determination of the case. See Herb v. Pitcairn, 324 U.S. 117 (1944). The state habeas corpus court decided no federal question nor did it need to, as this question had been previously addressed by the Supreme Court of Georgia in Petitioner's direct appeal to that court. Respondent submits that because in the case at bar the state court did not decide a federal question there is nothing for review by this Court.

Assuming that this Court should find that this issue is properly before it by means of a petition or a writ of certiorari, Respondent submits that the Supreme Court of Georgia properly applied the appropriate federal standard and state standard in determining that Petitioner's motion for a change of venue in connection with his retrial for the offense of murder was properly denied. The Supreme Court of Georgia considered the evidence presented in support of Petitioner's motion for a change of venue in light of this Court's decision in Irvin v. Dowd, 366 U.S. 717, 723 (1961) and also decided that under state law, a motion for a change of venue lies within the sound discretion of the trial judge. Berryhill v. State, 249 Ga. 442, 443-445, 291 S.E.2d 685 (1982). These standards were appropriate to review Petitioner's claim that his motion for a change of venue should have been granted and no stricter standard for the retrial of a capital case is constitutionally mandated, as long as those prospective jurors chosen to serve at a trial can lay aside any impressions or opinions they may have and render a verdict based on the evidence presented in court.

Applying the appropriate standard, the Supreme Court of Georgia held that the low percentage (8%) of venirepersons excused for prejudice corroborated the impartiality of the other venirepersons and further found that even if Petitioner's public opinion poll evidence was considered, it did not answer the crucial question set forth by this Court in Irvin v. Dowd, supra, i.e., whether any opinions held by prospective

venirepersons could be laid aside and the issues determined solely upon the evidence presented to the jury. Id. at 445.

Assuming that this question is properly before the Court, as the state court's order concerning which Petitioner seeks review did not address the issue on the merits, Respondent submits that the Supreme Court of Georgia in determining this issue on its merits properly applied the appropriate constitutional standards to the evidence presented in support of the motion for change of venue. This issue presents nothing for review by this Court.

II. THE QUESTION OF THE EXCUSAL FOR CAUSE OF A VENIREPERSON IRREVOCABLY COMMITTED TO THE IMPOSITION OF THE DEATH PENALTY WAS NOT DECIDED ON FEDERAL CONSTITUTIONAL GROUNDS IN THE STATE HABEAS CORPUS COURT'S ORDER WHICH IS THE SUBJECT OF THIS PETITION FOR A WRIT OF CERTIORARI AND THIS GROUND IS NOT PROPERLY BEFORE THE COURT.

Petitioner contends that a prospective venireperson who was "irrevocably committed to the imposition of the death penalty" should have been excused for cause under this Court's decision in Witherspoon v. Illinois, 391 U.S. 510, 522 (1968). However, the state habeas corpus court again deferred to the prior decision of the Supreme Court of Georgia as to this issue, when the issue was considered by the Court in Petitioner's direct appeal. Berryhill v. State, supra, at 446-447. (Petitioner's Appendix "A" A-11). Therefore, by deferring to the decision of the Supreme Court of Georgia and not considering this issue on the merits, as is required under state law, the state habeas corpus court applied an adequate and independent state ground in finding this petition to be without merit and did not reach the federal constitutional question. As already noted, in such cases as Herb v. Pitcairn, 324 U.S. 117 (1944), this Court has required that before it will review a state court decision, it must be shown that the state court actually decided a federal question. Here, the state habeas corpus court's order which is the subject of this petition for a writ of certiorari did not decide the federal question and therefore, this issue is not properly before the Court.

Assuming the issue to be properly before this Court, the Supreme Court of Georgia properly applied federal constitutional principles in determining that a prospective venireperson must only be stricken for cause based on a

prejudice in favor of the death penalty, if such a venireperson is irrevocably committed to impose the sentence of death regardless of the court's charge and regardless of the facts and circumstances of the case. Berryhill v. State, supra at 447. The Supreme Court of Georgia properly determined that the facts in this case showed that the juror would consider the evidence and that he would not always blindly vote for the death penalty without considering the evidence presented. (Trial transcript, 635-637). The prospective juror did not unequivocally state that he would in no circumstances consider a penalty less than death. As the United States Court of Appeals for the Eleventh Circuit stated in Hance v. Zant, 696 F.2d 940 (11th Cir. 1983):

> A person who favors the death penalty can be entrusted to make the choice between death and life imprisonment unless that person's bias for capital punishment is unequivocal and absolute. See Witherspoon, supra, 391 U.S. at 519, 522 n. 21, 88 S.Ct. at 1775, 1777 n. 21.

Hance v. Zant, supra at 956.

If this question is properly before the Court, the Supreme Court of Georgia properly applied appropriate federal constitutional principles as set forth by this Court's decision in Witherspoon v. Illinois, supra and found this claim to be without merit. This issue presents nothing for this Court's review.

III. REGARDLESS OF THE APPROPRIATE STANDARD TO BE APPLIED TO CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, THE STATE HABEAS CORPUS COURT CORRECTLY FOUND AS A MATTER OF FACT THAT NO INEFFECTIVE ASSISTANCE OF COUNSEL HAD BEEN DEMONSTRATED.

Petitioner contends that this Court should grant his petition for a writ of certiorari to determine what standard is required of counsel representing a person charged with a capital offense. Petitioner acknowledges that the question presented to this Court in Washington v. Strickland, 693 F.2d 1243, 1463 (5th Cir. 1982), cert. granted, 103 U.S. 2451 (1983), is the appropriate standard for determining the burden which a habeas corpus petitioner must carry in order to sustain a claim of ineffective assistance of counsel. Under the decision of the United States Court of Appeals for the Fifth Circuit, a dual standard is required of a habeas corpus petitioner, i.e., a petitioner must show that counsel was ineffective and that this ineffectiveness caused actual and substantial prejudice to the petitioner's case. Respondent submits that regardless of the standard applied and regardless of the necessity of showing actual and substantial prejudice, Petitioner's attorneys during his retrial for murder clearly rendered effective assistance and no inquiry into cause and prejudice need even be attempted. As the state habeas corpus court noted:

> Counsel here easily meets the test. They were experienced in the trial of criminal cases. They prepared for and vigorously represented Petitioner's cause at his retrial. The effort they put forth was certainly reasonably effective within the meaning of the standard.

(Petitioner's Appendix "A" A-6).

The major focus of Petitioner's claim is that his trial attorney failed to present a defense on Petitioner's behalf of drug induced insanity, therefore denying the jury the opportunity to consider Petitioner's "one plausible line of defense." The state habeas corpus court noted that counsel had clearly conducted substantial investigation into what they concluded to be Petitioner's one plausible line of defense. Upon being appointed to Petitioner's case on retrial, Petitioner's counsel consulted with original trial counsel concerning the potential of presenting an insanity defense at trial. Petitioner's attorneys knew that original counsel were claiming to have been ineffective for failing to raise an organic mental disease defense based on drug-induced insanity.

The fact that no electroencephalogram had been run on Petitioner had presented a problem at Petitioner's initial trial. (State Habeas Corpus Transcript 29-30). In addition to the report that Dr. Hughes had prepared for the first trial, an EEG was run, as Dr. Hughes' report indicated that a neurological study was necessary to preclude the possibility of brain damage, although he had discovered none in the psychological examination. (Habeas Corpus Transcript 98, 36). The results of the EEG were normal, indicating no organic brain damage. (H.C.T. 36). Since Petitioner's attorneys found there was no medical evidence of brain damage caused by prolonged drug abuse, they acted reasonably in foregoing this line of defense.

Upon receiving the "normal" results of the EEG, trial counsel employed a second psychologist to evaluate their client. (H.C.T. 20). After Dr. Hart interviewed the Petitioner and discussed his findings with the Petitioner's counsel, a decision was made not to use him as an expert, but rather to use Dr. Hughes, Petitioner's original doctor, who had treated Petitioner before the occurrence of the murder. Counsel felt

that Dr. Hart's testimony as an expert would be particularly damaging because of language in his report which indicated not only that Petitioner knew "right from wrong," but that Petitioner could act in a similar way in the future. (T. 101, 21). Fearing that this testimony would increase the likelihood of Petitioner receiving the death penalty, a traditional insanity defense for purposes of mitigation was adopted in light of the number of lay witnesses willing to testify on the issue. (T. 21, 37). Since this case involves a particularly heinous murder, Petitioner's counsel acted reasonably in choosing not to allow an expert to testify who would increase the jury's inclination to impose the death penalty, out of fear that Petitioner might be paroled and commit a similar crime if given a life sentence. Furthermore, there is no indication in Dr. Hart's report that he would be more favorably inclined toward a "legal" finding of insanity than was Dr. Hughes.

As the state habeas corpus court properly noted "evidence was presented on both sides of the issues of permanent insanity and drug induced organic brain damage." (T. 925-927, 1027, 1038, 1045, 1067, 1073, 1154-56). (Petitioner's Appendix A, A-8). Therefore, the state habeas corpus court properly determined that this was not a basis for finding counsel to be ineffective. As already noted, counsel did present evidence of Petitioner's substance abuse through the testimony of lay witnesses such as family members and friends and the Petitioner himself. (H.C.T. 39-40, 65).

Present counsel for the Petitioner seeks to have this Court find ineffective assistance of counsel based on a tactical decision made by Petitioner's attorneys at his retrial to abandon a defense which they investigated and found to have no factual basis. This clearly cannot support a finding of ineffective assistance of counsel, regardless of the standards applied. This is especially true where the evidence of Petitioner's abuse of drugs was presented through the testimony of lay witnesses as mitigating evidence by trial counsel. The

state habeas corpus court found, under these cirucmstances that counsel had rendered reasonably effective assistance within the meaning of the standards set forth in Washington v. Strickland, supra. The facts of this case simply do not support a finding of ineffective assistance and no federal constitutional question is presented for this Court's resolution.

CONCLUSION

As no substantial federal constitutional question is presented for this Court's review, Respondent prays that this petition for a writ of certiorari be denied.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant Attorney General

MARION O. GORDON
First Assistant Attorney General

WILLIAM B. HILL, JR.
Senior Assistant Attorney General

SUSAN V. BOLEYN
Assistant Attorney General

Please serve:

SUSAN V. BOLEYN
132 State Judicial Building
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3397

CERTIFICATE OF SERVICE

I, Susan V. Boleyn, Attorney of Record for the Respondent and a member of the Bar of the Supreme Court of the United States certify that in acordance with the rules of the Supreme Court of the United States I have this day served a true and correct copy of this Brief for the Respondent in opposition upon the Petitioner's attorney by depositing a copy of this Brief in the United States mail with proper address and adequate psstage to:

Mr. Stephen G. Milliken
511 E Street, N.W.
Washington, D. C. 20001

This 14th day of February, 1984.

Susan V. Boleyn
SUSAN V. BOLEYN